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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CITIZENS FOR SAFE NEIGHBORHOODS, Plaintiff and Appellant, v. CITY OF SANTA ROSA, Defendant and Respondent; BODEAN COMPANY, INC., Real Party in Interest and Respondent.	A141295 (Sonoma County Super. Ct. No. SCV252028)

BoDean Company, Inc. (BoDean) operates an asphalt plant in the City of Santa Rosa (City). Although the City requires that asphalt production take place in areas zoned for heavy manufacturing, the plant has long operated as a legally nonconforming use in an area zoned for light industrial uses. BoDean sought a minor conditional use permit for an equipment modernization project that included upgrading air filtration equipment and adding storage silos to the one already in place at the plant. According to BoDean, the project would not expand production capacity but would instead allow the plant to operate more efficiently by eliminating the need to restart the plant for each batch of asphalt. The City determined the project was categorically exempt from the California

Environmental Quality Act (CEQA) (Pub. Resources Code,[1] § 21000 et seq.) both because it constitutes a minor alteration to existing facilities and because it consists of reconstructing existing facilities. (Guidelines, §§ 15301, 15302.[2])

Plaintiff and appellant Citizens for Safe Neighbors (Citizens) sought a writ of mandate directing the City to set aside its approval of the project for failure to comply with CEQA. On appeal from a judgment denying the writ, Citizens contends the project does not qualify for the categorical exemptions relied upon by the City, and that even if it did, an exception applies because there is a "reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Guidelines, §15300.2, subd. (c).) Among other things, Citizens complains that the project will facilitate increased production of asphalt, has aesthetic impacts in the vicinity of the plant, and may increase emissions and impact traffic. Citizens also contends the project violates the City's zoning code because it increases the degree or detrimental effects of the plant's nonconformity with existing zoning laws. We reject these contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facility at the heart of this dispute was built in 1953. The City issued a use permit in 1961 authorizing the plant to produce asphalt. In 1968, the City re-approved the use permit and authorized asphalt production at the facility indefinitely. In 1987, the City granted a conditional use permit authorizing the construction of a single, 78-foot tall storage silo at the existing facility.

The BoDean asphalt plant is located on a site that covers about 6.5 acres. The site is surrounded on the north, west, and south by properties with commercial and industrial

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[1]Further statutory references are to the Public Resources Code unless otherwise specified.

[2] The regulations governing CEQA are found in title 14 of the California Code of Regulations. (Cal. Code Regs., tit. 14, § 15000 et seq.) Consistent with common usage, we hereafter refer to the regulations governing CEQA as the Guidelines. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319, fn. 4.)

uses. A railroad line forms the site's eastern boundary. To the east of the railroad line is a residential neighborhood. There are also residential neighborhoods to the west and south beyond the commercial and light industrial uses that border the asphalt plant site.

The asphalt plant site is in an area currently zoned as "Medium Transit Village – Light Industrial." Heavy manufacturing, including the production of asphalt, is not permitted on lands zoned as light industrial. Although the operation of the asphalt plant is no longer consistent with the current land use designation and zoning classification, it is a vested and legal nonconforming use that has been continuously operated since approximately 1953. In 2011, consistent with the City's specific plan for the area and pursuant to a settlement agreement between the City and BoDean, the City reaffirmed that the existing industrial uses at BoDean's facility, including the production of asphalt, are vested and legal nonconforming uses.

In November 2011, BoDean applied to the City for a minor conditional use permit for what it characterized as equipment upgrades. BoDean proposed to install three new storage silos, ancillary conveyors, three batchers, and an air filtration system referred to as a "fiberbed blue smoke control system." The upgrade project would have no effect on the plant's production or production capacity. According to BoDean, the plant's production capacity is limited to 300 tons per hour, or 7,200 tons per day, as a result of physical limitations and a condition contained in a permit issued by the Bay Area Air Quality Management District. Although the proposed upgrades would not increase production capacity, the new silos would increase the facility's capacity to store asphalt and thereby enhance operations by reducing the need to continually activate the facility's processing equipment for each batch of asphalt.

As asphalt is produced at the plant, it is either loaded onto a waiting truck from a batch tower or transported by a conveyor to a storage silo, where it can later be loaded onto a truck. Heated asphalt can only remain in the silos for 18 to 24 hours before it must be loaded onto a truck or otherwise removed. The proposed additional silos would be connected to the existing silo by conveyors. The three new silos that were to be situated

next to the existing silo were proposed to be 82-feet high, or four feet taller than the pre-existing 78-foot high silo.

The City planning commission approved BoDean's proposal and found that the project was exempt from CEQA review on the basis of a Class 1 categorical exemption (Guidelines, § 15301) for existing facilities, and a Class 2 categorical exemption (Guidelines, § 15302) for reconstruction of existing facilities. The staff report presented to the planning commission described the project as "an enhancement of the facility's existing mechanical equipment." According to the report, the silos would only allow for more storage of asphalt but would "have no impact on the rate or volume of production." The staff report concluded that the hours of operation and the number of employees at the site would remain unchanged. Staff found "the proposed equipment upgrade to be categorically exempt from CEQA because it is a minor alteration to an existing facility that results in a negligible increase in use and production capacity," which is consistent with the Class 1 and Class 2 categorical exemptions.

The staff report presented to the planning commission further explained that application of the Class 1 and Class 2 categorical exemptions was supported by detailed analyses indicating that there was "no reasonable possibility of a significant impact from the project." The staff considered a traffic impact study concluding that the potential for increased traffic was "very limited" in light of the fact there is a "finite need for asphalt" restricted by what is needed for local projects. The traffic impact study concluded that truck trips would be distributed in a "somewhat different temporal pattern" during the day but that the total number of trucks leaving the site would remain unchanged. The change in temporal pattern would result from the fact that less time would be needed to load a truck from a storage silo as opposed to existing loading methods. According to the traffic impact study, there may be an additional three to five trucks arriving and departing during the peak morning hour, but that the increase was negligible and would fall far short of the City's threshold of 50 peak hourly trips to trigger the need for a formal traffic study.

The staff report also considered an air quality study that concluded the project would have no air quality impacts and, instead, would result in beneficial reductions to health risks and would reduce pollutant emissions, greenhouse gas emissions, carbon dioxide impacts, and odors. The air quality study noted that emissions from the new silos would be "controlled by a fiberbed blue smoke control system," which the pre-existing facility did not have.[3]

In addition, the staff report took into account a visual assessment that analyzed the visual impact of the three new silos and associated equipment. The assessment noted that the profile of the proposed silos was "essentially identical" to the existing silo and related equipment. Among other things, the assessment concluded the additional silos would not obstruct scenic views and were consistent in nature and scale with the existing industrial setting. The staff report acknowledged that the approach used in the visual assessment was consistent with conventional methodology used by the City regarding maintenance and enhancement of visual quality.

Citizens, which is an unincorporated association formed to promote environmental protection and the development of safe neighborhoods in the City, appealed the planning commission decision to the city council. The city council rejected Citizens' appeal, approved the minor conditional use permit, and filed a notice of exemption reflecting that the project is exempt from CEQA under the Class 1 and Class 2 categorical exemptions (Guidelines, §§ 15301, 15302).

Citizens filed a verified petition for writ of mandamus and injunctive relief in the Sonoma County Superior Court. Citizens asserted causes of action for violations of CEQA and the City zoning code. It alleged that the project did not fall within the scope of the claimed categorical exemptions from CEQA and that, even if the exemptions applied, an exception to the exemptions applied because there was substantial evidence to support a fair argument that the project may have significant environmental impacts. Citizens also alleged that the City's approval of the project violated the City's zoning

[3]According to the study, "Odor from asphalt plants is generally caused by 'blue smoke,' which is composed of tiny oil droplets that can be seen as a blue haze."

code by allowing a change to a nonconforming use that increased the degree or detrimental effects of the nonconformity. Among other things, Citizens alleged that the project may have significant environmental impacts upon aesthetics, views, air quality, health, safety, and traffic. It sought to set aside the approval and require the City to comply with CEQA and the zoning code.

Citizens sought a stay to enjoin BoDean from proceeding with the upgrade project while its writ petition was pending before the trial court. As set forth in the parties' briefs on appeal, the lower court denied the stay and no further relief was sought to enjoin BoDean from completing the project, which is now fully built and operational.

The trial court ultimately entered a judgment denying the petition. The court concluded that substantial evidence supports the application of the Class 1 categorical exemption for minor alterations to existing facilities. The court reasoned that adding storage space and related equipment to an existing facility could be characterized as minor alterations given that the project would not lead to an increase in the production of asphalt or an expansion of the facility's use. The court also concluded that substantial evidence did not support a fair argument the project may result in significant effects due to unusual circumstances. With regard to the claim the project violated the City's zoning code, the court concluded that the 82-foot silos complied with applicable zoning requirements and that the project would not intensify any nonconforming use. Citizens timely appealed the judgment denying its petition.

DISCUSSION

I. *CEQA*

A. CEQA Principles and Standards of Review

It is state policy in California that "the long-term protection of the environment . . . shall be the guiding criterion in public decisions." (§ 21001, subd. (d).) To achieve this goal, CEQA and the Guidelines implementing it provide for a three-step process. "In the first step, the public agency must determine whether the proposed development is a 'project,' that is, 'an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment'

undertaken, supported, or approved by a public agency." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 286.) There is no dispute that the plant upgrades proposed by BoDean qualify as a project.

If the proposed activity is determined to be a project, the public agency must proceed to the second step of the process, which considers whether the project "is exempt from compliance with CEQA under either a statutory exemption [citation] or a categorical exemption set forth in the regulations [citations]. A categorically exempt project is not subject to CEQA, and no further environmental review is required. If the project is not exempt, the agency must determine whether the project may have a significant effect on the environment. If the agency decides the project will not have such an effect, it must 'adopt a negative declaration to that effect.' [Citations.] Otherwise, the agency must proceed to the third step, which entails preparation of an environmental impact report before approval of the project." (*Tomlinson v. County of Alameda, supra,* 54 Cal.4th at p. 286.)

In this case, the county determined the project was categorically exempt from CEQA. "A categorical exemption is based on a finding by the Resources Agency that a class or category of projects does not have a significant effect on the environment. [Citations.] Thus an agency's finding that a particular proposed project comes within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment. [Citation.] On review, an agency's categorical exemption determination will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects." (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.)

After a public agency establishes that a project falls within a categorical exemption, "the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2. The most commonly raised exception is subdivision (c) of section 15300.2, which provides that an activity which would otherwise be categorically exempt is not exempt if there are 'unusual circumstances' which create a 'reasonable possibility'

that the activity will have a significant effect on the environment." (*Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at p. 115.) Here, Citizens seeks to rely on the unusual circumstances exception.

In *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 (*Berkeley Hillside*), our Supreme Court clarified the procedure and standards of review applicable to a claim that the unusual circumstances exception applies. (See *Citizens for Environmental Responsibility v. State Ex Rel. 14th Dist. Ag. Assn.* (2015) 242 Cal.App.4th 555, 574 (*Citizens*).) There are two alternative ways to prove the exception. (*Berkeley Hillside,* at p. 1105.)

In the first alternative, a "challenger must prove both unusual circumstances and a significant environmental effect that is due to those circumstances. In this method of proof, the unusual circumstances relate to some feature of the project that distinguishes the project from other features in the exempt class. [Citations.] Once an unusual circumstance is proved under this method, then the 'party need only show a *reasonable possibility* of a significant effect due to that unusual circumstance.' " (*Citizens, supra,* 242 Cal.App.4th at p. 574; accord, *Berkeley Hillside, supra,* 60 Cal.4th at p. 1105.)

An agency's initial determination as to whether there are unusual circumstances is reviewed for substantial evidence.[4] (*Berkeley Hillside, supra,* 60 Cal.4th at p. 1114.) Under this deferential standard of review, our role in considering the evidence is different from the public agency's. (*Ibid.*) The agency must weigh the evidence before it and make a finding based upon the weight of the competing evidence. As a reviewing court, we do not reweigh the evidence. Instead, we "must affirm [the agency's] finding if there is any substantial evidence, contradicted or uncontradicted, to support it." (*Ibid.*) We "resolv[e] all evidentiary conflicts in the agency's favor and indulg[e] all legitimate and reasonable inferences to uphold the agency's finding . . . ." (*Ibid.*)

[4]We review the agency's decision and not the decision of the trial court. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

If there is substantial evidence to support an agency's finding that there are unusual circumstances, we proceed to consider whether there is a reasonable possibility that an unusual circumstance will produce a significant effect on the environment. As our Supreme Court explained in *Berkeley Hillside,* a public agency must apply the "fair argument" standard in assessing this question. (*Berkeley Hillside, supra,* 60 Cal.4th at p. 1103.) Under the fair argument test, " 'an agency is merely supposed to look to see if the record shows substantial evidence of a *fair argument* that there may be a significant effect. [Citations.] In other words, the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect.' " (*Id.* at p. 1104.) An agency must find a "fair argument" if there is any substantial evidence to support that conclusion, even if there is competing substantial evidence in the record that the project will not have a significant environmental impact. (*Id.* at p. 1111.) Our review is "limited to determining whether the agency applied the standard 'in [the] manner required by law.' " (*Id.* at p. 1116.)

The second alternative for proving the unusual circumstances exception does not involve the two-pronged approach used in the first alternative. Instead, "a party may establish an unusual circumstances with evidence that the project *will have* a significant environmental effect." (*Berkeley Hillside, supra,* 60 Cal.4th at p. 1105.) If a project *will have* significant environmental effects, it follows that the project presents unusual circumstances without the need to separately establish that some aspect of the project distinguishes it from others in the exempt class. (*Citizens, supra,* 242 Cal.App.4th at p. 576.) We apply the deferential substantial evidence test to an agency's determination that unusual circumstances exist under this second alternative for proving the exception. (*Berkeley Hillside, supra,* at p. 1114.)

B. Applicability of Categorical Exemption

Citizens contends that BoDean's asphalt plant project does not come within the scope of the Class 1 or Class 2 categorical exemptions. The scope of a categorical exemption is a question of law we review de novo. (*Save our Carmel River v. Monterey Peninsula Water Management District* (2006) 141 Cal.App.4th 677, 693.) As noted

above, we review the agency's factual determination that a project fits within an exempt category for substantial evidence. (See *Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at p. 115.)

The Class 1 exemption (Guidelines, § 15301) is referred to as the "existing facilities" exemption. "Class 1 consists of the operation, repair, maintenance, permitting leasing, licensing, or *minor alteration* of existing public or private structures, *facilities,* mechanical equipment, or topographical features, involving *negligible or no expansion of use* beyond that existing at the time of the lead agency's determination." (Guidelines, § 15301, italics added.) As set forth in the Class 1 exemption, "[t]he key consideration is whether the project involves negligible or no expansion of an existing use." (*Ibid.*)

Citizens contends the plant upgrades do not constitute a "minor alteration" to existing facilities within the meaning of the Class 1 exemption. It claims the three new silos do not constitute a negligible expansion of use and points out that the new silos exceed height limitations specified in the zoning code. It also argues that the upgrades will "substantially expand the hourly production capacity of the plant" and thus constitute an expansion of use disallowed under a Class 1 exemption.

There is substantial evidence in the record that the new silos constitute a negligible expansion of the plant's facilities. As BoDean's visual assessment established, the profile of the proposed silos is "essentially identical" to the existing silo, which is four feet shorter than the new silos. Although the additional silos will be visible from certain areas neighboring the plant, the visual assessment concluded the additional silos "did not add substantially to the existing industrial mass on site." Further, the assessment concluded that views would not be substantially altered by the addition of the silos adjacent to the existing silo.

The existing facilities exemption includes a non-exclusive list of the types of projects that fit within the exemption. (Guidelines, § 15301, subds. (a)–(p).) Although none of the examples specifically addresses a situation similar to ours, it is noteworthy that additions to existing structures are included within the scope of the exemption as long as any addition does not exceed a certain size. (*Id.,* subd. (e).) The specified size

limitations are not directly applicable here because they focus on the floor area of the expansion. (See *id.*, subd. (e)(2) [addition of up to 10,000 square feet of floor area may be allowed under specified circumstances].) Nevertheless, these examples demonstrate that the existing facilities exemption encompasses modest expansions of facilities or structures. As the visual assessment demonstrated, the additional silos are a minor expansion when considered as part of the overall site and asphalt plant.

Citizens' argument that the height of the new silos violates the City's zoning code lacks merit. As an initial matter, it is unclear why compliance with the zoning code bears upon a determination of whether the project falls within the categorical exemption for minor alterations to existing facilities. Citizens' argument is premised upon the fact that the City establishes a height limit of 55 feet for structures on land designated as light industrial. (Santa Rosa City Code, § 20-24.040(B).) However, the City's zoning code also specifies that the height limit in any applicable zoning district may be exceeded by "towers, gables, spires, cupolas, water tanks, and similar structures" provided that design review approval is obtained. (Santa Rosa City Code, § 20-30.070(B) & (D).) City staff found that the proposed silos constitute "towers or similar structures" within the meaning of the zoning code and therefore are allowed provided that design review is obtained. Issuance of the minor conditional use permit was conditioned upon BoDean complying with the zoning code and securing design review approval.[5] According to BoDean, it obtained design review approval following the City's approval of the project. That separate approval is not within the scope of this appeal. Therefore, even if zoning code height limits have some relevance to the CEQA analysis, there is nothing in the record before this court suggesting that the new silos violate the City's zoning code, which

[5]Insofar as Citizens suggests the City improperly relied upon the design review condition as a mitigation measure to bring the project within the scope of a categorical exemption, it is mistaken. (See *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1107 [lead agency may not rely on mitigation measures to grant a categorical exemption].) Compliance with the zoning code, including conditioning approval upon obtaining design review of the aspects of the project that exceeded the presumptive height limit, was part of the project design from the outset and was required by law. (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1353.)

allows structures such as the silos to exceed the 55-foot height limit in areas zoned as light industrial.

As for Citizens' contention that the project will expand production of asphalt, there is substantial evidence in the record that the silos will not result in increased production. The silos provide short-term storage only and do not affect the plant's capacity to produce asphalt. There is ample evidence that the added storage may alter the timing of production but does not increase the rate at which asphalt may be produced. As the plant's general manager pointed out, asphalt sales are dictated by local demand. Expanded short-term storage of asphalt leads to efficiencies in operation but does not increase demand.

Citizens relies on an expert who claims that additional silo storage will permit increased production, but for purposes of determining whether a categorical exemption applies, it is not our function to reweigh the evidence. Our role is limited to determining whether substantial evidence, even if contradicted by other evidence, supports the City's determination. (*Davidon Homes v. City of San Jose*, *supra*, 54 Cal.App.4th at p. 106.) In this case, there is substantial evidence supporting the City's conclusion that the project falls within the scope of the Class 1 exemption for minor alterations to existing facilities. The project satisfies the key criterion that it "involves negligible or no expansion of an existing use." (Guidelines, § 15301; see *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1312, 1316 [Class 1 exemption applied where it was undisputed there was no change in operations or capacity of existing medical waste incinerator].)

In light of our conclusion that the project falls within the scope of the Class 1 exemption for existing facilities, it is unnecessary to consider whether the project also qualifies for a Class 2 exemption for replacement or reconstruction of existing facilities. (Guidelines, § 15302.)

C. Unusual Circumstances Exception

1. *Existence of Unusual Circumstances*

Citizens next argues that the City was required to conduct a full environmental review because the unusual circumstances exception precludes application of a

categorical exemption. As discussed above, there are two alternative methods to establish that the unusual circumstances exception applies. In the first alternative, the agency first determines whether the project presents an unusual circumstance "by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location." (*Berkeley Hillside, supra,* 60 Cal.4th at p. 1105.) If an unusual circumstance is found to exist, the exception applies if the record contains substantial evidence of a fair argument that there may be a significant effect on the environment. (*Id.* at p. 1104.) In the second alternative to establish the exception, an unusual circumstance exists if substantial evidence indicates the project "will" in fact have a significant impact on the environment. (*Id.* at p. 1105.) The certainty of a significant environmental impact is itself an unusual circumstance that obviates the need to identify some aspect of the project that is distinct from others in the exempt category.

Here, as Citizens points out, the analysis pursued by the City did not fit into either of the two alternatives for establishing the applicability of the unusual circumstances exception. The City did not discuss or make a finding as to whether the asphalt plant project presented an unusual circumstance because of some characteristic that distinguished it from other projects in the exempt class. Nor did the City consider whether the unusual circumstances exception applies because the project will, in fact, have a significant impact on the environment. Instead, the City in effect applied the "fair argument" standard to assess whether there was a reasonable possibility of a significant impact from the project, without first concluding that the project presented an unusual circumstance.

The parties do not agree on the significance or effect of the City's failure to make a predicate finding that the project presents an unusual circumstance due to some distinguishing characteristic of the project. Citizens argues that the lack of a finding precludes a substantial evidence review to support the non-existent finding. By contrast, the City seems to suggest that we can imply a finding that the project presents no unusual circumstance, although there would have been no need for the City to consider the possibility of a significant environmental impact if such a finding had been made.

Citizens contends the project presents an unusual circumstance primarily because of its location. According to Citizens, the asphalt plant project is unlike typical projects involving minor alterations to heavy manufacturing plants because the asphalt plant is a nonconforming use near residential neighborhoods that is per se out of compliance with zoning requirements applicable to light industrial uses. For its part, the City claims that similar operations in the surrounding area preclude an unusual circumstances finding based on the plant's location.

In *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 871, the appellate court was faced with a similar situation in which the agency had addressed whether there was a reasonable possibility of a significant effect on the environment due to unusual circumstances without first addressing whether there were any unusual circumstances. In that case, the court found it unnecessary to address the first requirement of the exception—i.e., whether there were unusual circumstances—because the unusual circumstances exception failed under the second requirement—i.e., whether there was a reasonable possibility of a significant effect on the environment. (*Ibid.*) We agree with the approach followed by the court in *North Coast Rivers Alliance*. We will assume, without deciding, that the project presents an unusual circumstance due to its location because, as explained below, the unusual circumstances exception fails when we apply the fair argument standard in considering possible effects on the environment due to any unusual circumstances.

2. *Reasonable Possibility of Significant Effect on the Environment*

We turn to the question of whether there is substantial evidence in the record supporting a fair argument that the project may have a significant effect on the environment. (See *Berkeley Hillside, supra,* 60 Cal.4th at p. 1104.) A " '[s]ignificant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." (§ 21068; see Guidelines, § 15382.) The focus of the inquiry is on "the physical conditions within the area affected by the project," which includes "land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance . . . ." (Guidelines, § 15382.)

"Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (Guidelines, § 15384, subd. (a).) "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Guidelines, § 15384, subd. (b).)

With these principles in mind, we consider each of the environmental impacts that Citizens claims the asphalt project will have.

Production of Asphalt

We begin with Citizens' assertion that the upgrades to the asphalt plant will lead to increased production levels. This is an appropriate starting point because many of the other claimed environmental impacts, such as increased emissions, traffic, and odors, turn on whether the project will increase the plant's production of asphalt.

Citizens places great emphasis on the fact that, in its application for the project, BoDean requested asphalt production of 759,000 tons per year. According to Citizens, data gathered from the Bay Area Air Quality Management District revealed that the plant's highest production level occurred in 2011 at 250,000 tons for the year, while production levels in earlier years were even lower. Thus, Citizens argues, the project would more than triple current production levels.

The focus on the numerical value of 759,000 tons per year is a red herring. According to the City, this value was a hypothetical modeling number used by the Bay Area Air Quality Management District as the basis for its air analysis, which was conducted as part of a separate entitlement process. As set forth in the City's notice of exemption, "[p]roduction limits are not addressed by the Minor Conditional Use Permit as they are established and enforced by the Bay Area Quality Management District." Thus, the City did not approve a particular production level as part of the permit process or increase a previously established limit on production. Indeed, as reflected in

BoDean's proposal for a minor conditional use permit, there were no maximum limits placed on the plant's capacity by the Bay Area Air Quality Management District before BoDean applied for the permit. The only constraint on production was the physical limitation of the plant to produce 300 tons per hour. Citizens has offered nothing to dispute these claims. Consequently, the 759,000-ton figure cited in the application has no practical bearing on actual, anticipated, or permitted production levels.[6]

Citizens also relies upon an analysis performed by Richard Love, who claims to have been involved in aggregate and asphalt production for 36 years. According to Love, the addition of the three silos will permit BoDean to increase the volume of product leaving the plant by about 39 percent. Love's analysis is premised upon the assumption that, with only one storage silo in operation, BoDean can load 2,300 tons of asphalt per eight-hour shift, because it can produce 2,000 tons and it will have 300 tons already stored in the one silo.[7] By contrast, according to Love, Bodean will be able to load 3,200 tons per eight-hour shift with the three new silos in place, because the 2,000 tons it produces will be supplemented by 1,200 tons already stored in the four silos. Love contends this amounts to a 39.13 percent "increase [in] production."

Love's analysis does not constitute substantial evidence that the plant upgrades and addition of silos may increase production. Indeed, his analysis assumes that production per hour will remain constant both before and after installation of the silos.

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[6]Although not presented as a separate argument, Citizens contends the baseline for purposes of evaluating the project's environmental impacts is the plant's existing use and not its permitted use. (See *Communities for a Better Environment v. South Coast Air Quality Management District*, *supra*, 48 Cal.4th at pp. 320–327.) It is suggested that BoDean used permitted rather than actual levels of asphalt production as the baseline, thereby understating the environmental effects of the plant upgrades. We disagree. Because the plant was not subject to permits that limited production, it is unclear what levels BoDean would have used as the baseline other than its actual production. Further, because BoDean's application claimed that production would be unaffected by the upgrades, it seems apparent that existing production, which would remain unchanged, was the baseline.

[7]Love assumes the plant is capable of producing 250 tons of asphalt per hour. BoDean's application states that the plant can produce 300 tons of asphalt per hour.

What his analysis demonstrates is that the addition of three silos will permit more asphalt to be loaded onto trucks during some discrete period of time. This result is unsurprising and consistent with BoDean's acknowledgment that truck traffic may increase during peak hours as a result of the increased storage capacity. But nothing in Love's purported expert analysis allows us to conclude that production capacity will increase. His analysis is simply a mathematical exercise demonstrating the increased capacity to load trucks when the silos are full.

In a related argument, Citizens relies upon an analogy to a convenience store coffee pot that was relayed by a resident who opposes the asphalt plant project. As explained by Citizens, if a coffee pot makes 30 cups per hour, then only 30 cups can be sold in that hour. But if you have three thermoses that each hold 30 cups of coffee, then you can sell 120 cups in that hour. The coffee pot analogy is simply another way of expressing the principle described by Love. Additional storage capacity allows more concentrated sales during a defined period of time. But the flaw in the analogy is that after selling 120 cups in one hour, your thermoses are empty and you are back to selling no more than 30 cups in the next hour—or, alternatively, spending the next three hours filling up your three thermoses and selling no coffee. The point is that additional storage capacity does not increase the capacity to make coffee or asphalt.

Moreover, as BoDean's general manager explained, asphalt sales are not like sales of coffee at a convenience store. Asphalt sales are made by order and are pre-planned. There are almost no unplanned sales where a customer simply arrives unannounced. An asphalt plant cannot afford to fill its silos and hope that customers show up to buy the product, which must be used before it turns hard. Unlike a convenience store that simply disposes of its excess coffee at the end of the day, an asphalt plant cannot afford to dispose of asphalt at the end of the day if there is no customer to purchase it. Asphalt is produced for local sales and for specific jobs; it is not produced for convenience or to have a large supply on hand.

Citizens also cites testimony of a lay witness who claims the new silos will increase production by eliminating a production bottleneck. While lay testimony may

qualify as substantial evidence when based on relevant personal observations and nontechnical issues (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402 (*Ocean View Estates*)), the same is not true when the testimony involves technical issues. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 908; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583.) In the absence of evidence that the lay witness had technical expertise in asphalt production, the opinion does not rise to the level of substantial evidence.

The evidence offered by Citizens does not alter the fundamental fact that the plant upgrades do not increase the capacity of the plant to produce asphalt. At most, Citizens has confirmed the undisputed proposition that the additional storage silos may alter the timing of deliveries during the course of the day. Moreover, merely because BoDean has the capacity to deliver more asphalt during a defined period does not mean that the demand exists to take advantage of that capacity. Asphalt sales are a product of local demand, and the plant's production cannot increase beyond what is needed for local projects. Even at its height in 2011, the plant's production of asphalt was far lower than the plant's capacity to produce asphalt, even with just one silo available for storage.[8]

Citizens has failed to establish that demand for asphalt, which drives its production, will likely increase. Citizens claims "there is no evidence in the record . . . that sales of asphalt are stagnant or will remain so; Sonoma County is in the process of upgrading Highway 101 and there are [a] number of large projects currently proposed that would bring increased sales." The statement by Citizens is not substantial evidence. It is speculation unsupported by facts. Further, it was not the City's or BoDean's burden to present evidence regarding future demand for asphalt in Sonoma County. As the party seeking to establish the applicability of the unusual circumstances

[8]250,000 tons of asphalt was produced in 2011. If the plant could produce 2,000 tons per eight-hour shift (as set forth in Richard Love's calculations), the plant was capable of producing 400,000 tons if it was only operated eight hours per day 200 days per year, and that is without even considering the storage available in the original silo.

exception, it was Citizens' burden to present evidence supporting its claim. (*Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at p. 115.) Citizens did not satisfy its burden.

We conclude the record does not contain substantial evidence supporting a fair argument that asphalt production may increase as a result of the plant upgrades.

Aesthetic Impacts

Citizens next alleges the three new silos will result in significant aesthetic impacts upon the neighboring community. We are not persuaded.

As support for its position, Citizens contends that the three "massive" silos exceed the zoning code's height limitation by 27 feet each and are equivalent to three eight-story buildings. It also argues that concerned area residents gave firsthand testimony that the new silos impact private and public views, including views of the "historic DeTurk Round Barn."

We first note that the three new silos are situated next to the existing silo, which is just four feet shorter than the existing silos. Based upon the renderings included in the administrative record, the difference in height is insubstantial and largely imperceptible. Further, as discussed above, the silos are consistent with the applicable zoning regulations because they are considered towers or similar structures that are permitted if design review approval is obtained.

The crux of Citizens' complaint is that some nearby residents will be able to see the new silos in addition to the preexisting silo. It relies upon the principle that observations of area residents on nontechnical subjects may qualify as substantial evidence of a fair argument. (See *Ocean View Estates, supra,* 116 Cal.App.4th at p. 402; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 937.)

The analysis in *Ocean View Estates, supra,*116 Cal.App.4th 396, is instructive. There, a water district sought to cover a four-acre reservoir with an aluminum roof. (*Id.* at p. 398.) The cover would appear a dull gray and be visible from some nearby homes. (*Id.* at pp. 401–402.) In addition, there was photographic evidence suggesting the cover would be visible from a nearby public trail. (*Id.* at p. 402.) The court

concluded that relevant, personal observations of nearby residents on nontechnical issues constituted substantial evidence to support a fair argument the project may have a significant adverse aesthetic impact. (*Id.* at p. 403.) The court observed that "expressions of concern" by a few people may not be substantial evidence but that the evidence went beyond "a few people expressing concern about the aesthetics of the project" because there was "substantial evidence that the cover will be visible from some private and public view areas . . . ." (*Ibid.*)

In conducting its analysis, the court in *Ocean View Estates* cited aesthetic considerations contained in the CEQA Guidelines. (*Ocean View Estates, supra,* 116 Cal.App.4th at p. 401.) These considerations, as expressed in a checklist bearing upon whether aesthetic impacts may be significant, ask whether the project would "a) Have a substantial adverse effect on a scenic vista? b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway? c) Substantially degrade the existing visual character or quality of the site and its surroundings? d) Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area?" (Guidelines, Appen. G.)

Here, the only claimed scenic resource identified by Citizens is the "historic DeTurk Round Barn." However, there is no description of the view from that building or whether it will be impacted by the addition of the three silos. Citizens does not even state the building's distance from the silos or include any pictures or other visual depictions that would demonstrate any damage, much less substantial damage, to the view from that location as a result of the additional silos. The visual assessment provided by BoDean does include a map showing the location of the Round Barn, which is more distant than a location where a photograph was taken in which the silos are barely visible. The record does not contain substantial evidence that the view from the DeTurk Round Barn will be affected by the addition of the silos.

Without a showing that the new silos will adversely affect a scenic vista, substantially damage scenic resources, or create a new source of light or glare, we are left

to consider whether the additional silos will "substantially degrade" the existing visual character of the site. (Guidelines, Appen. G.) In this case, unlike in *Ocean View Estates*, the addition of the new silos next to the existing one does not fundamentally transform nearby views from something that might be described as scenic into a more industrial vista. The preexisting views are of an industrial silo. The evidence offered by Citizens amounts to the concerns of several nearby residents that the new silos will be visible, but they fail to explain why the placement of the three silos next to the existing one will substantially degrade the preexisting views. These concerns do not constitute substantial evidence of fair argument that the new silos may have a significant impact upon aesthetics.

Air Quality, Health & Safety, Noise and Odor Impacts

Citizens contends the asphalt plant project may have significant impacts upon air quality, health and safety, noise, and odor. But Citizens' argument largely consists of pointing out that nearby residents have expressed concerns and filed complaints *in the past* about noise, odors, and smoke. Evidence of past complaints does not establish that the plant upgrades will exacerbate any of these conditions. In the absence of evidence that the project may lead to increased asphalt production, there is no reason to believe that these conditions will worsen.

As support for the proposition that the project will lead to additional emissions of dust, Citizens cites the report prepared by Richard Love. The dust emissions identified by Love result from "cold aggregate drawdown," which he describes as the dusty process of removing asphalt that has cooled to the point that it can no longer be used. Love concludes that cold aggregate drawdown will need to take place 10 times as often as BoDean claims. However, Love's conclusion does not turn on the presence of additional silos or any other plant upgrades, as far as we can tell. He simply disagrees with BoDean's claim about the need to conduct cold aggregate drawdown during the year. Without evidence that production will increase, there is no reason to believe that the incidence of cold aggregate drawdown will increase. Accordingly, Love's report does

not provide substantial evidence of a significant environmental impact resulting from the project.

Traffic

Finally, Citizens argues that the asphalt plant project may result in significant traffic impacts. It criticizes the "scant" traffic study offered by BoDean, but as the party asserting the applicability of the unusual circumstances exception, it is Citizens' burden to demonstrate a fair argument that there may be a significant impact upon traffic. (See *Davidon Homes v. City of San Jose*, *supra*, 54 Cal.App.4th at p. 115.)

Citizens once again relies upon the analysis prepared by Richard Love. On the basis of his conclusion that deliveries could be increased by about 39 percent during one eight-hour shift, Love opined that the project would result in 45 more truck trips per day. Because Love's traffic analysis turns upon his questionable conclusion about increased production of asphalt, the analysis suffers from the same infirmities that afflict his production claim. As discussed above, asphalt production is driven by local demand. Without evidence that local demand for asphalt will increase, there is no reason to believe that production will increase or that more truck trips will be required over the course of the day.

Furthermore, Love's estimates of hourly increases in traffic are not significantly different from those contained in the traffic study presented to the City by BoDean, which concluded that truck trips would not necessarily increase but would be distributed in a different temporal pattern due to the increased storage capacity provided by the new silos. The study estimated that up to three to five additional trucks would arrive and depart during peak hours, which is far below the City's threshold of 50 peak hour trips to trigger the need for a formal traffic study. Love's estimate of an additional 45 truck trips over eight hours works out to around five additional trips per hour, which is not much different than the estimate provided by BoDean's traffic study.

The concerns of residents who live in proximity to the asphalt plant are understandable. It is clear from the record that many would prefer to phase out the nonconforming use and eliminate the negative impacts associated with the longstanding

operation of the plant. But our task is not to assess whether the plant as it has operated through the years has negative impacts upon the nearby environment. Rather, we are asked to consider whether the plant upgrades, including the addition of storage silos, will exacerbate these negative impacts. Because we conclude the record does not contain substantial evidence to support a fair argument that the upgrades may have a significant environmental impact, Citizens has not met its burden to establish the applicability of the unusual circumstances exception. Consequently, the project is categorically exempt from CEQA as a minor alteration to existing facilities.

II. *City Zoning Code*

Chapter 20-61 of Division 6 of the City's zoning code provides regulations for nonconforming uses that were lawful before the adoption or amendment of the zoning code but that would be prohibited or regulated differently under the current version of the zoning code. (Santa Rosa City Code, § 20-61.010(A).) The purpose of Chapter 20-61 is to discourage the long-term continuation of nonconforming uses while allowing them to exist under limited conditions. (*Ibid*.)

The City's zoning code provides in relevant part that "[c]hanges to a nonconforming use of a structure by addition, enlargement, extension, reconstruction, or relocation, may be allowed only if the changes comply with all of the regulations of the applicable zoning district and the following provisions: [¶] a. A nonconforming use of a structure may only be expanded or enlarged in size or capacity, or extended to occupy a greater area, or increased in intensity through the approval of a Minor Conditional Use Permit in compliance with section 20-52.050. [¶] b. In approving the Minor Conditional Use Permit, the review authority shall make the following finding, in addition to those identified in Section 20-52-050 G. (Findings and decision): The enlargement, expansion, extension or increase would not increase the degree or the detrimental effects of the nonconformity." (Santa Rosa City Code, § 20-61.020(C)(2).)

Citizens contends that BoDean's asphalt plant project violates the City's zoning code in several respects. First, it argues that the prerequisite for approval is not met because the changes do not comply with all of the regulations of the applicable zoning

district in that the three new silo towers exceed the 55-foot height limitation applicable to a light industrial zone. Second, it asserts that the project will intensify the detrimental effects of the asphalt plant's nonconformity by allowing an increase in asphalt production with foreseeable impacts to air quality, traffic, noise, dust, and odor.

As explained above, the City's zoning code expressly allows towers and similar structures to exceed the height limits of a given zoning district upon obtaining design review approval. (Santa Rosa City Code, § 20-30.070(D).) As a condition to the issuance of the minor conditional use permit, BoDean was required to comply with the zoning code and secure design review approval. Citizens does not dispute BoDean's claim that it obtained design review approval, which is outside the scope of this appeal. Without evidence that design review approval was not obtained or was improperly given, the mere fact the silos exceed the presumptive height limit applicable to light industrial zones does not establish a violation of the zoning code. Accordingly, the record before this court establishes that BoDean complied with all applicable regulations of the zoning code governing light industrial zones.

As for the contention that the asphalt plant project increases the degree or detrimental effect of the plant's nonconformity, Citizens' arguments are a rehash of its assertions as to why the unusual circumstances exception should preclude application of a categorical exemption from CEQA. Once again, Citizens contends the project allows for increased asphalt production with attendant effects on emissions, traffic, noise, and odors.

In approving the minor conditional use permit, the City concluded that "the proposed site enhancements will not increase production capacity; as such, the site modifications are not expected to increase the degree or the detrimental effects of the nonconformity." Upon review of a discretionary zoning decision, we " 'determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision.' " (*West Chandler Boulevard Neighborhood Ass'n v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1518.) We have already concluded that substantial evidence supports the City's conclusion that the

project falls within the scope of the Class 1 categorical exemption for minor alterations because it involves, at most, a negligible expansion of an existing use. For all of the reasons we have previously discussed, there is likewise substantial evidence to support the City's finding that the asphalt plant project will not increase the degree or detrimental effects of the plant's nonconformity with the current light industrial zoning designation for the site.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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McGuiness, P.J.

We concur:

_____
Pollak, J.

_____
Jenkins, J.

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